

## 815 CMR: COMPTROLLER'S DIVISION

### 815 CMR 5.00: SETTLEMENTS AND JUDGMENTS

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### 815 CMR 5.00: SETTLEMENTS AND JUDGMENTS

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#### 5.01: Purpose

(1) The purpose of 815 CMR 5.00 is to clarify the procedures by which agencies may preserve the availability of funds and may obtain access to funds for the payment of judgments and settlements. Such clarification will:

- (a) Aid agencies in making the payment of judgments and settlements a part of their current year operation or capital project budgeting; and
- (b) Insure faster payment of judgments and settlements, which will lessen the waiting time for successful claimants and litigants against the Commonwealth and its agencies and minimize the amount of any applicable interest.

(2) 815 CMR 5.00 shall identify funds legally available for payment, and shall minimize the need to use deficiency payments for judgments and settlements of claims against the Commonwealth. 815 CMR 5.00 shall also prevent any use by agencies of the Commonwealth of funds not legally available for payments of such judgments and settlements.

#### 5.02: Definitions And Applicability

815 CMR 5.00 is applicable to the payment of settlements and judgments for claims against the Commonwealth and its agencies. For the purposes of 815 CMR 5.00, these terms are defined as follows:

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Agency - Any agency, department, office, commission, committee, council, board, division, bureau, institution (including institutions of higher education), office or section within any executive or legislative department of the Commonwealth. Authorities established by statute such as the Massachusetts Bay Transportation Authority, the Massachusetts Turnpike Authority, the Massachusetts Water Resources Authority, the Massachusetts Port Authority and local housing authorities are not included within the definition of agency.

Claim - Any demand by any person for damages to compensate an injury or wrong allegedly suffered, including but not limited to personal injury, violation of civil rights, breach of contract, failure to comply with contract bidding laws, incorrect or improper personnel determinations regarding pay, promotion or discipline, failure to comply with statutory or constitutional provisions applicable to employment, and eminent domain taking damages, including any attorney's fees and interest associated with these claims.

Judgment - Any final, unappealable order of any court or any administrative body authorized by statute to review or adjudicate claims against the Commonwealth and its agencies.

#### Legally Available Funds

(a) Legally available funds include monies appropriated either specifically for the payment of settlements and judgments or authorized for the payment of certain contractual expenditures;

(b) Legally available funds *do not include* any funds not specifically authorized by 815 CMR 5.00 for use in the payment of judgments and settlements, including any legislatively authorized "special funds" and trust funds as defined in M.G.L. c. 29, § 1. Such special funds and trust funds must be used solely to further their statutorily authorized goals. Agencies shall not interpret those goals to include the payment of judgments and settlements arising from claims related to those goals, unless such payments are specifically authorized for the funds.

Settlement - Any agreement to pay a claim covered by 815 CMR 5.00 entered into by an official duly authorized to bind the Commonwealth or an agency in payment of a claim, whether the agreement settles the claim prior to or after the institution of litigation.

Tort Claims Administrator - The person designated by the Secretary of

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Administration and Finance to administer the duties and responsibilities outlined in 815 CMR 5.00.

5.03: Procedures For Tort Claims Governed By M.G.L. c. 258

Settlement during statutory presentment period. A claim under M.G.L. c. 258 must be assessed and acted upon within six months of receipt by the Executive Office of a Secretariat (or by the Office of the Attorney General when initial presentment is made there). The following procedures and Time lines shall be followed:

- Day 1: Presentment Notice received by the appropriate Executive Office [or the Office of the Attorney General (AGO)]
- Day 3: AGO forwards a copy of the notice to the appropriate Executive Office; the Executive Office forwards a copy of any notice it receives from a claimant to the AGO.
- Day 90: Executive Office receives agency's investigation report and disposition recommendation.
- Day 120: Executive Office has acted on recommendation in one of the following ways:
- commenced negotiations with claimant (or legal representative thereof) on settlements of \$2500 and under:
- sent investigation report and settlement recommendation over \$2500 to AGO or ;
- sent denial to claimant.
- Day 135: AGO approves terms of settlement on recommendations over \$2500. Executive Office commences settlement negotiations with claimant.
- Day 160: Executive Office sends negotiated settlement documents to Comptroller (attention: DAB) together with assents of AGO and Executive Office for Administration and Finance (if required) and

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a release executed by claimant.

The documents forwarded to the Comptroller should include the following:

a copy of the presentment letter;  
a settlement memorandum describing the terms of the settlement;  
a release executed by claimant and;  
the consent of the Attorney General (for settlement over \$2500)  
and the Secretary of Administration and Finance (for settlement over \$20,000) if required.

Comptroller processes settlement payment.

Day 180: Presentment procedures have been completed. Executive Office has sent copies of investigation report, settlement documents and denials to AGO.

5.04: Settlement or Judgment After the Initiation of Litigation Pursuant to M.G.L. c. 258

Payment of settlements and judgments after the initiation of litigation pursuant to M.G.L. c. 258 ordinarily shall be in accordance with the procedures set forth in 815 CMR 5.09 and shall be made only from funds obtained, as described below, through funds specifically appropriated to pay such judgments or settlements. But in exceptional circumstances such settlements and judgments may be paid from the Tort Claim Fund if approved by the Secretary of the Executive Office for Administration and Finance.

5.05: Exclusion of Payment of Presentment Period Settlements from Tort Claim Fund

No settlement of a tort claim based on any claim described in M.G.L. c. 258, § 10, or on any civil rights claim in the nature of a tort, may be paid from the Tort Claim Fund, during the six month presentment period or otherwise.

5.06: Procedures For Personnel Claims For Monetary Awards

- (1) 815 CMR 5.06 applies to:
  - (a) Claims for monetary awards by current or former employees regarding any aspect of their employment by the Commonwealth, including, but not limited to:

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claims related to all non-classification job actions (including discipline and termination, pay and promotion, transfers, leave and overtime disputes), position classifications, and conditions of employment or employment discrimination; and

(b) Settlements or orders (administrative or judicial) arising from proceedings involving employees of the Commonwealth before the Massachusetts Civil Service Commission (pursuant to M.G.L. c. 31), the Massachusetts Commission Against Discrimination (pursuant to M.G.L. c. 151B), the Massachusetts Labor Relations Commission (pursuant to M.G.L. c. 150 E), the Massachusetts Department of Personnel Administration (pursuant to M.G.L. c. 30 §§ 45-50) and the grievance and arbitration procedures set forth in any collective bargaining agreement entered into by the Commonwealth or its agencies, as authorized by M.G.L. c. 150E, § 8.

(2) 815 CMR 5.06 does not apply to retroactive salary adjustments made pursuant to negotiated collective bargaining agreements. Such retroactive salary adjustments are separately appropriated to meet agency obligations under legislatively approved collective bargaining agreements. These funds are held as a salary reserve and allocated by the Fiscal Affairs Division of the Executive Office for Administration and Finance ("FAD").

(3) Payment of Settlements, Orders or Judgments relating to personnel claims for monetary awards.

(a) The following may be paid from the agencies' current year operating budgets, without regard to the year in which the claims arose, but only from funds appropriated for salary purposes, if such unused salary funds exist and pursuant to spending plan approval by FAD:

1. Awards by the Personnel Administrator in personnel classification appeals pursuant to M.G.L. c. 30, § 49.
2. Arbitration and grievance procedures awards under collective bargaining agreements pursuant to M.G.L. c. 150E, § 8. Such claims shall be paid as soon as possible after the appointing agency receives notice of the award and spending approval from FAD. Checks in payment of such awards shall be issued at the end of the first full pay period after receipt of such notice and approval.
3. All other awards for back pay (not including attorney's fees, interest, or other damage awards) for personnel claims of employees who currently are on the payroll of the Commonwealth.

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(b) All other payments of settlements, orders or judgments relating to personnel claims for money awards described in 815 CMR 5.06(3), shall be in accordance with 815 CMR 5.09 INFRA, and only from funds obtained through the deficiency budget process specifically to pay such settlement, order or judgment. Such payments shall include, but not be limited to, back pay or damage awards to terminated employees, attorneys fees or interest awards to terminated employees, attorneys fees or interest awards to any employees, continuing or terminated, and back pay awards to continuing employees which, because of lack of funds, cannot be paid pursuant to 815 CMR 5.06(3), *Supra*.

#### 5.07: Procedures For Contract Claims

(1) This section applies to:

(a) Post-litigation settlements or judgments in contract claims arising from capital projects including:

1. all claims arising from contracts related to capital construction projects funded through bond funds pursuant to M.G.L. c. 29, § 14, including contracts for all phases of project study, design and construction;
2. all claims arising from contracts related to "pool account" capital projects, i.e., bonded projects which include various activities of a certain type, such as asbestos or toxic waste removal; and
3. all claims arising from eminent domain takings in connection with capital projects.

(b) Post-litigation settlements and judgments in contract claims arising from agency contracts funded from the agency's annual maintenance appropriation.

(2) 815 CMR 5.07 generally does not apply to disputed claims for payment under contracts, whether funded through capital or maintenance appropriations, which are resolved at the administrative level as part of a dispute resolution mechanism of contract management prior to the initiation of litigation. These claims may be paid from funds encumbered for the contract or by the submission of a change order or release or other appropriate encumbering action as appropriate. If such funds are unavailable, payment shall be made pursuant to 815 CMR 5.09 *Infra*.

(3) Notification Procedure When Contract Litigation Instituted.

(a) Within 30 days of the institution of litigation on any contract claim, the agency attorney, or other staff person assigned to the matter for the purposes of evaluating the financial risk of the litigation and monitoring its progress, shall submit a report on the claim to the General Counsel of the Comptroller. The

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report shall be on a form supplied by the Comptroller and include:

1. a description of the claim, including contract and encumbrance identification numbers;
2. the amount of the claim;
3. an evaluation of the potential amount of contingent liability; and
4. an evaluation of the potential for a settlement or likelihood of recovery on the claim.

(b) Reports shall be updated once a year by August 1. Where possible, reports shall be prepared in consultation with the Assistant or Special Assistant Attorney General assigned to handle the case.

(4) Procedure for payment

(a) Contract claims from maintenance appropriations which are settled or ordered to be paid pursuant to litigation in the fiscal year in which funds were encumbered shall be paid from said encumbered funds through the accounts payable period.

(b) Any settled pre-litigation claims related to regular maintenance appropriations for which contract funds are unavailable due to the expiration of the accounts payable period, and all post-litigation settlements and judgments in contract matters shall be paid in accordance with the procedures set forth in 815 CMR 5.06 *Infra*, regarding the payment of settlements and judgments after the initiation of litigation.

#### 5.08: Other Litigation

Settlement and judgments arising from any claim other than those enumerated above shall be made in accordance with 815 CMR 5.09 *Infra*

#### 5.09: General Procedure For Payment Of Settlements And Judgment After Initiation Of Litigation

(1) Responsibility of assigned attorney or staff person: Preparation of Reports. When litigation involving a monetary claim against the Commonwealth covered by these regulation terminates in a final Settlement or judgment with regard to such a claim, the agency attorney or staff person assigned to handle or monitor the claim shall do the following:

- (a) Prepare a report indicating:
  1. the principal amount of the settlement or judgment;
  2. the amount of any attorney's fee award;

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3. the amount of any interest award or accrued, and whether the interest continues to accrue post-judgment;
4. a request for payment of the amount;
5. a description of the basis for the request, (e.g., Court order or settlement agreement); and
6. whether the assigned attorney desires to award the payment check to the claimant;

(b) Forward the report with a copy of the settlement or judgment just described to the General Counsel of the Comptroller within the time frames set forth in 815 CMR 5.09(2). In the case of settlement prior to judgment, the agency need not reduce the settlement to a court ordered agreement for judgment.

(c) Retain the litigation file as open until the Comptroller notifies the assigned attorney that the payment has been made. The Attorney General's litigation file may be closed when that office has provided sufficient information to allow the concerned agency to file a payment request with the Comptroller.

(2) Time for preparation of reports. The report described in 815 CMR 5.09(1)(a) shall be sent by the agency attorney to the General Counsel of the Comptroller:

- (a) if based on a settlement agreement, within 15 days of signing of the final settlement papers; or
- (b) if based on a judgment against the Commonwealth or any agency, within fifteen days of the Commonwealth's decision not to appeal; or
- (c) if based on a judgment against the Commonwealth or an agency, where the Commonwealth decides to take an appeal from the judgment, within fifteen days of any final order on appeal or in remand proceedings, if such remand proceedings are ordered.

(3) Each report shall be prepared on forms supplied by the Comptroller and after consultation with the Assistant Attorney General or Special Assistant Attorney General assigned to the matter, where appropriate.

#### 5.10: Responsibilities of the Comptroller.

(1) Upon receipt of a report described in 815 CMR 5.09(1)(a) from an assigned attorney, the Comptroller will review the report, certify the amount due and payable, review agency accounts related to the claim to determine whether funds are available to pay the claim, and consult with the agency regarding available funds.

- (a) If funds are available to satisfy the claim in an applicable agency account, in whole or in part, the Comptroller will authorize the agency to initiate the warrant



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procedure for issuance of a check from the agency account.

(b) If no funds are available to satisfy the claim in whole or in part, the Comptroller will refer the certified amount to the agency with instructions for the agency to initiate a deficiency budget request.

(c) The Comptroller will notify the assigned attorney after the check is issued in payment of the claim that the litigation file may be closed.

#### 5.11: Issuance of Checks

Checks issued pursuant to 815 CMR 5.09 shall be made to the order of the claimant or, if the claimant is represented by counsel, to the order of the claimant and counsel. Checks shall be mailed to the claimant or, if the claimant is represented by counsel, to the counsel, or, if requested by the assigned attorney, to the assigned attorney.

#### REGULATORY AUTHORITY

815 CMR 5.00: M.G.L. c. 30A; c. 258, §§ 1-5.